IN THE HIGH COURT OF JUDICATURE AT BOMBAY

IN ITS INSOLVENCY JURISDICTION

NOTICE OF MOTION NO.149 OF 2003
IN
INSOLVENCY NOTICE NO.N/107 OF 2002

Re: Sushil Kumar Agarwal & anr.... Judgment Debtors.

Ex-parte:
ICDS ..Judgment Creditor.

....

Mr. Kishore Jain i/b Mr. Tushar Goradia for the Judgment Creditor.

CORAM: DR. D.Y. CHANDRACHUD, J.

21st November, 2006.

P.C. :

The Notice of Motion has been taken out by the Judgment Debtor for setting aside the insolvency notice taken out by the Judgment Creditor. In **Paramjeet Singh Patheja v. I. C. D. S. Limited** (Civil Appeal 4130 of 2006), the Supreme Court has in a decision delivered on 31st October, 2006 held thus :

> "i)that no insolvency notice can be issued under Section 9(2) of the Presidency Towns Insolvency Act, 1909 on the basis of an Arbitration Award;
>
> ii) that execution proceedings in respect of the award cannot be proceeded with in view of the statutory stay under Section 22 of the SICA Act. As such, no insolvency notice is liable to be issued against the appellant.

iii) Insolvency Notice cannot be issued on an Arbitration Award.

iv) An arbitration award is neither a decree nor an Order for payment within the meaning of Section 9(2). The expression “decree” in the Court Fees Act, 1870 is liable to be construed with reference to its definition in the CPC and held that there are essential conditions for a “decree”.

(a) that the adjudication must be given in a suit.

(b) That the suit must start with a plaint and culminate in a decree, and

(c) That the adjudication must be formal and final and must be given by a civil or revenue court. An award does not satisfy any of the requirements of a decree. It is not rendered in a suit nor is an arbitral proceeding commenced by the institution of a plaint.

v) A legal fiction ought not to be extended beyond its legitimate field. As such, an award rendered under the provisions of the Arbitration Act, 1996 cannot be construed to be a “decree” for the purpose of Section 9 (2) of the Insolvency Act.

vi) An insolvency notice should be in strict compliance with the requirements in Section 9(3) and the Rules made thereunder.

vii) It is a well established rule that a provision must be construed in a manner which would give effect to its purpose and to cure the mischief in the light of which it was enacted. The object of Section 22, in protecting guarantors from legal proceedings pending a reference to BIFR of the principal debtor, is to ensure that a scheme for rehabilitation would not be defeated

by isolated proceedings adopted against the guarantors of a sick company. To achieve that purpose, it is imperative that the expression "suit" in Section 22 be given its plain meaning, namely any proceedings adopted for realization of a right vested in a party by law. This would clearly include arbitration proceedings.

viii) In any event, award which is incapable of execution and cannot form the basis of an insolvency notice."

The judgment of the Supreme Court holds that an insolvency notice issued under Section 9(2) of the Presidency Towns Insolvency Act, 1909 cannot be sustained on the basis of an arbitral award which has been passed under the Arbitration & Conciliation Act, 1996. In view of the judgment of the Supreme Court, the Notice of Motion shall have to be made absolute since the insolvency notice in the present case is founded on an arbitral award under the Arbitration & Conciliation Act, 1996. The insolvency notice is set aside. The Motion is accordingly made absolute.